IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/01/2004

CORAM

THE HON'BLE MR. JUSTICE M. THANIKACHALAM

CRL.O.P.NO.37232 OF 2003 AND CRL.O.P.NO. 37233 OF 2003

Rajan Taneja ..Petitioner in
both the petitions.

-Vs-

T. Ram Naresh Tiripathi ..Respondent in
Crl.O.P.37232/2003
Shri Handloom Fabrics,
rep. by its Proprietor Shri N. Bharat,
S/o. Ram Naresh Tiripathi
Having its branch office at
6-B, Meththai Street,
Ammapet, Salem-3. ..Respondent in
Crl.O.P.37233/2003

Petition filed under Section 482 Cr.P.C. praying for the relief as
stated therein.

For petitioner : Mr. A. Ramesh

For respondent : Mr. M. Ravindran
Senior Counsel
for Mr. G. Karthikeyan

:O R D E R

The petitioner, who is accused in C.C.Nos.208/2003 and 209/2003 on the file of the Judicial Magistrate No.5, Salem, has filed this petition, to quash the proceedings against him in both the cases.

2. This order shall dispose of the above two petitions.

3. In both the cases, the respondents herein as complainants accused the petitioner, that on the assurances and promises made by the accused, goods were supplied to him, though the accused undertook to pay the value of the goods supplied to him, within 30 days from the date of invoice and in case, he could not pay the amount within the period, the amount due would carry interest at 24% per annum, he was not prompt in clearing the dues without delay.

4. It is the further contention of the respondents/complainants

in both the cases, that the accused subsequently also failed to keep up his promise, though he assured for prompt payment, on that basis, goods were also supplied to him. Therefore, according to the complainants, in both the cases, the accused had failed to clear a sum of Rs.9,01 ,732/- (in C.C.No.208/2003) and a sum of Rs.4,14,087/- (in C.C.No.209 /2003). It is the further case of the complainants that believing the representation and assurances made by the accused, not only at the first instance, but also at the later point of time, material goods were supplied to him. But for the false representation made by the accused, the complainants would not have ventured to supply the materials. In this view, according to the petitioner, the non payment of the amount for the goods supplied, would amount to criminal breach of trust, as well as cheating and therefore, he should be dealt with under Sections 406 and 420 I.P.C. in addition to 120(B) I.P.C.

5. On the basis of the averments contained in the complaints, and on the basis of the sworn statements recorded, the Judicial Magistrate had taken the case on file and issued summons. After appearance by the accused, either after the issue of NBW or otherwise, these petitions are filed, aiming to quash the proceedings in both the cases.

6. The learned counsel for the petitioner would submit, that even taking the complaints as such, the allegations available therein, are insufficient, to make out a case, either under Section 406 or under Section 420 I.P.C. and therefore, allowing the case to be tried, will not serve any earthly purpose. It is the further submission of the learned counsel, that the proceedings initiated by the complainants, are an abuse of process of law and therefore, both the cases are liable to be quashed. It is the further contention of the learned counsel for the petitioner, that there is no criminal liability and if at all, it could be called only as civil liability, for that the prosecution would not lie, as ruled by the Apex Court but the complainants, in order to circumvent the civil litigation, to have a short cut root, to harass the petitioner, had approached the Court, for which it is not the forum for prosecution and it should be held as an abuse of process of law.

7. The learned senior counsel, Mr. M. Ravindran appearing for the respondents/complainants, on the other hand would contend, though the transaction between the parties could be described as civil in nature, there is a criminal liability also, because of the breach committed by the petitioner/accused, with a dishonest intention, inducing the complainants, to deliver the goods and therefore, when both remedies are available to the complainants, prosecuting the accused, who had committed the offence under Sections 406 & 420 I.P.C., is not a bar.

8. It is an admitted position, that there was business transaction between the petitioner and the complainant/respondent (Crl.O.P.No.3723 3/2003) commencing from 16.4.1996 and the same was continued till 200 3. In the other case, viz., Crl.O.P.No.37232/2003, the business transaction between the complainant and the accused, commenced on and from 13.5.1998 and it continued till 2003. As per the complaint in

C.C.No.209/2003, the balance of amount payable by the accused/petitioner, as on 11.3.2003 is Rs.4,14,057/-. The amount payable by the accused/petitioner, in C.C.No.208/2003 as on 11.3.20 03 is Rs.9,01,732/-. Thereafter, in the business transaction, dispute arose between the parties. In order to realise the balance due to the complainants/ respondents, the complainants had approached the criminal court, short circuiting or avoiding civil proceedings, though prima facie it appears, it is an ordinary business transaction between the parties, not involving any offence punishable under penal law. However, the complainants had labelled the breach of contract, if any committed by the petitioner/accused, as criminal breach of trust, as well as cheating. In this view, both the cases have been filed, by the complainants, seeking punishment, not only under Sections 406 and 420 I.P.C., but also under Section 120-B I.P.C.

9. Section 120(B) I.P.C. will come into operation only when there is any criminal conspiracy. A Criminal conspiracy could be hatched, when two or more persons agree to do an illegal act, or an act which is not illegal by illegal means. Admittedly, the petitioner/accused in both the cases, is a single person, and he started his business transaction, with the complainants, in the ordinary course of business. Therefore, the question of criminal conspiracy or punishment for criminal conspiracy would not arise at all for consideration. However, the complainants/respondents, attempted to rope in the accused/ petitioner, under Section 120(B) I.P.C. also, which would reveal the mind of the complainants i.e. they are bent upon to drag on the businessman into criminal court. It is not known, whether the cases were taken on file under Section 120-B I.P.C. also. However, prima facie, no offence could be made out, under Section 120-B I.P.C.

10. The learned counsel for the petitioner, in both the cases, submits that the transaction between the parties is an ordinary business transaction, not involving any criminal breach of trust, which should follow, the ingredients required for Section 406 I.P.C. are not available and in this view, it is unnecessary for the accused to face the offence under Section 406 I.P.C. It is the further contention of the learned counsel for the petitioner, that in a case of goods sold on credit, the moment, the buyer gets the goods, he becomes the owner and the seller looses his title on the goods and if at all, the seller is entitled to only for the money due on it, for that if at all the seller is entitled, to proceed as per the agreement and the said transaction cannot be labeled as "criminal breach of trust".

11. In order to attract the definition of "criminal breach of trust", there must be entrustment of property. Here, there is no entrustment of property, the fact being, it is a business transaction, where the seller sold the property and the buyer purchased the same, of course on credit basis, as agreed between the parties. In fact, the parties were fully aware of the fact, that there may be breach of covenant and that is why, they had contemplated payment of interest, in the event, payment is not made within in the stipulated time. In this view, it is impossible to say, that the complainants entrusted the property with the accused and such property was dishonestly misappropriated. Under the sale of goods, the title to the property itself passes, forthwith, on the completion of sale. The position

being so, no question of entrustment or misappropriation would arise, attracting Section 406 I.P.C. The second ingredient is, that the person entrusted should have dishonestly misappropriated the property or converted the same to his own use or dishonestly using or disposing of that property, thereby willfully causing sufferings to the other person, in violation of the terms of agreement. This ingredient is also totally absent in this case. In order to attract the offence of criminal breach of trust, as defined under Section 405 I.P.C., followed by penal section 406 I.P.C., there must be a clear dishonest intention. Dishonest intention is defined as, "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly". Section 23 of I.P.C. defines "wrongful gain" and "wrongful loss" and it is as follows:

"Wrongful gain" :- "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.
"Wrongful loss" :- "Wrongful loss" is the loss by unalwful means of property to which the person losing it is legally entitled.

In this context, we have to see the averments in the complaints, since we have to see a prima facie case of criminal breach of trust, in order to allow these proceedings, to proceed further.

13. Paragraph 2 of the complaint in C.C.No.208/2003 reads: "on 13.5.1998, the accused have approached the complainant and placed orders for the supply of Handloom cloth. Accordingly the business transaction commenced between the accused and the complainant from 13.5.98 till date on the assurances and promises made by the accused. As per the regular accounts maintained in the usual course of business, the accused owe a sum of Rs.9,01,732/- (Rupees nine lakhs one thousand seven hundred and thirty two only) as on 11.3.2003".

14. Paragraph-3 reads, "on the representation and assurances made by the accused, to pay the value of the goods supplied to him, within 3 0 days from the date of invoice and in case of default agreeing to pay the dues with interest at 24% p.a., goods were supplied to him."

15. Paragraph-4 reads: "In the course of the transaction the accused represented that he will be very prompt in the clearances of the dues without delay the accused further represented as if he is having business at a higher level and therefore there may not be any problem in clearing the dues to the complainant. Initially the payments were made promptly by the accused, which induced the complainant to supply more and more goods to the accused. Now to the surprise of the complainant, the accused failed to keep up his promises and failed to clear a sum of Rs.9,01,732/- (Rupees Nine Lakhs one thousand seven hundred and thirty two only) though it is outstanding balance from the date of supply."

16. Nowhere, in the complaints, it is stated, that the accused had dishonest intention at the commencement of the business transaction, either to commit criminal breach of trust or to cheat him. It is specifically stated, that the payments were made promptly by the accused, which induced the

complainant to supply more and more goods to the accused, which is common in the business transaction. In this view, the prompt payments made by the accused then and there, as admitted in the complaints, would show, that there was no dishonest intention, at the inception of the business transaction, which should follow, the accused had no mens rea or intention, to commit criminal breach of trust, even as per the averments in the complaints.

17. In paragraph 5 of the complaint, it is stated, that the complainant, contacted the accused personally at Delhi on 25.2.2003 and demanded explanation from him about his misdeed. Then, the accused expressed the regrets and assured that in future, the same will not be repeated and the dues will be cleared. Here also we find no ingredients to attract the criminal breach of trust.

18. Paragraph-6 reads: "Believing the representation made by the accused, the complainant supplied materials to the accused. But for the false representation made by the accused, the complainant would not have ventured to supply materials. Now to the surprise of the complainant, the accused failed to keep up his promise and undertaking and failed to clear a sum of Rs.9,01,732/-, though it is outstanding balance from the date of supply."

19. Almost the allegations in both the complaints are same, except the difference in amount or the dues. By the above said averments, the complainants want to say that there was misrepresentation or by believing the misrepresentation or induced by the representation, he delivered the goods after 25.2.2003 also and in this view, an attempt is made to bring the conduct of the accused, after 25.2.2003, within the meaning of cheating. Thus, as seen from the complaints, two stages are contemplated. One upto the balance arrived viz., Rs.9,01,732/- in C.C.No.208/2003 and Rs.4,14,057/- in C.C.No.209/2003. The second stage appears to be after 25.2.2003 in C.C.No.208/2003 and after 24.2.2 003 in C.C.No.209/2003.

20. If the complainant had delivered the goods on the basis of the representation or misrepresentation, as the case may be, to the accused, after the above said two dates, and amounts have not been paid, then on the basis of the averments, I would prima facie, say some offence could have been made out. But, in my considered opinion, the averments in paragraph-7 of the complaints, in both the cases, are made wantonly, if possible to attract the offences, without any basis, which could be seen from the sworn statements recorded by the trial Court. The complainants have deposed at the time of tendering sworn statements before the Court, that there was a balance of Rs.9,01,732/- in C.C.No.208/2003 and Rs.4,14,057/- in C.C.No.209/2003. The complainants have further deposed, that the accused, though promised to pay the above said amounts, failed to pay the same, and thereby he committed criminal breach of trust. It is not the case of the complainants, that after 24.2.2003 and 25.2.2003, believing the representation made by the accused, they delivered the goods and thereafter also, receiving the goods, the accused had failed to pay the amounts, thereby committed criminal breach of trust, as well as cheating. If the complainant had not delivered any goods after 24.2.2003 and 25.2.2003, then the question of representation by the accused, or the alleged inducement by the accused to deliver further goods, would not arise for

consideration.

21. As seen from the sworn statements, as well as from the allegations in the complaints, we find no specific averments indicating such as the complainant was compelled to part away with the property, on the basis of the misrepresentation and inducement said to have been committed by the accused. In this view, prima facie, it appears to my mind that the allegations in paragraph-6 of the complaints have no base at all and they will not attract either Section 406 or 420 I.P.C. The averments extracted above, if at all would clearly make out a case of breach of contract, not quoted with criminal liability. If the accused had not paid the amounts, as per the invoices, the remedy available for the complainants, is to work out the same, before the competent civil forum and not to drag on the accused, to criminal forum abusing the process of Court. In my opinion, as rightly submitted by the learned counsel for the accused petitioner, it is an abuse of process of court and therefore, I think the inherent power vested in the Court under Section 482 Cr.P.C., should be exercised unhesitatingly.

22. The learned senior counsel, Mr. M. Ravindran appearing for the respondent submits, that it is not necessary always that the complaint should contain all the ingredients of the offence alleged, whereas it is sufficient, if the averments in the complaint, prima facie make out a case and it may not be proper on the part of the High Court, to invoke the jurisdiction under Section 482 Cr.P.C., to quash the complaint, merely because one or two ingredients of the offence, have not been stated, in detail or on the ground that the complaint disclosed a commercial or money transaction in it, relying upon a decision in Rajesh Bajaj v. State NCT of Delhi (1999) 3 SCC 259). In the case involved in the above decision, the complainant lodged a first information report, with the police for the offence under Section 420 I.P.C. It seems, the accused in that case, approached the Delhi High Court for quashing the FIR, on the premise that the complaint did not disclose the offence. A Division Bench of the Delhi High Court, concluding that the complaint did not disclose commission of the offence of cheating, punishable under Section 420 I.P.C.; that there is nothing in the complaint to suggest that the petitioner had a dishonest or fraudulent intention, at the time the respondent exported the goods; that there is nothing to indicate that the accused by deceiving the complainant, induced him to export the goods; and that on the face of the allegations contained in the complaint, it is purely a commercial transaction, which in a nutshell is that the seller did not pay the balance amount of the goods received by him as per his assurance, quashed the first information report and the said order was challenged before the Apex Court. The Apex Court has held as follows:

"The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation. At any rate, it is too premature a stage for the High Court to step in and stall the investigation by declaring that it is a commercial transaction simpliciter wherein no semblance of criminal offence is involved."

23. The learned counsel for the petitioner/accused would contend,

that the case involved in the above decision relates to an FIR and the principle laid down therein, may not be applicable, to our present case, which appears to be well founded. When the case was in the offing, i.e. in the FIR stage, the High Court analysing the case, took the view, as if no offence was made out, thereby preventing further investigation itself. In this view alone, the Apex Court had ruled, that it is too premature a stage for the High Court, to step in and stall the investigation by declaring that it is only a commercial transaction simpliciter. Here, as per the averments in both the complaints, it is crystal clear that it is a commercial transaction simpliciter, wherein I find no semblance of criminal offence involved. Therefore, as rightly contended by the learned cou nsel for the petitioner/ accused, this ruling may not be helpful for the complainants/respondents to retain the complaints.

24. In Shanthilal vs. Vimalchand [(2001) 8 SCC 649], the Apex Court had ruled, following the previous decision, quashing the FIR at the stage of investigation is not desirable. In our case, there is no investigation and if at all, witnesses have to be examined and the allegations leveled in the complaint alone have to be supported, for which there should be clear averments, attracting the penal provisions, which are absent. In Medchl Chemicals & Pharma (P) Ltd. vs. Biological E. LTD (2000) 3 SCC 269), the Apex Court had ruled, mere fact that the offence was committed during the course of a commercial transaction by itself is not sufficient to quash the complaint. For quashing the complaint, the Court has to see whether on the

fact situation ' civic profile' outweighs the 'criminal outfit'. The Hon'ble Supreme Court, considering the scope of Section 415 and 420 I.P.C. and affirming the previous decision, had held as follows:

"The ingredients of offences under sections 415, 418 and 420 cannot be said to be totally absent on the basis of the allegations in the complaint. We, however, hasten to add that whether or not the allegations in the complaint are otherwise correct has to be decided on the basis of the evidence to be led at the trial in the complaint case but simply because of the fact that there is a remedy provided for breach of contract, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy available to the appellant herein. Both criminal law and civil law remedy can be pursued in diverse situations. As a matter of fact they are not mutually exclusive but clearly coextensive and essentially differ in their content and consequence. The object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life. This does not, however, affect the civil remedies at all for suing the wrongdoer in cases like arson, accidents, etc. It is an anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. The two types of actions are quite different in content, scope and import".

25. In the case involved in the above decision, it seems that the complainant came out with a definite case that by reason of a promise of maintaining a continuous supply of raw materials to the complainant, for the

purpose of manufacturing ethambutol hydrochloride and in such a way so as not to cause any interruption or hindrance to the manufacturing activity of the complainants' factory, the complainant petitioner entered into an agreement. The accused therein failed to honour the agreement, resulting a private complaint alleging that there was substantial money loss and the sufferance of loss has been by reason of specific assurance and representation which turned out to be false. It is further alleged in that case, misrepresentation on the part of the accused respondent persons to the complainant, had been the major grievance and a definite and specific case has been made out that such a misrepresentation was intentionally effected since the accused persons were in the know of things that in the event the supplies are not effected, as per the agreement, the complainant was likely to suffer a wrongful loss, which in the interest of the transaction between the parties, the accused persons were bound to protect. Such kind of misrepresentation on the part of the accused or any loss on the failure of the accused in not paying the amount has not been made out in the complaint, except the non payment of the amount for the supply of goods, which is purely a civil transaction. As I have already pointed out, the complaint does not disclose any misrepresentation or subsequent supply of goods, in pursuance of any false representation, etc. In this view, as rightly contended by the learned counsel for the petitioner/accused, this ruling also may not come to the aid of the complainant/respondent.

26. The supply of goods on credit basis and failure to pay on the due date, would not come within the meaning of Sections 406 and 420 I. P.C., is the main submission of the learned counsel for the petitioner, based upon a decision in A.L Panian V. State of A.P. (1991 SCC (Cri) 84). In the case involved in the above decision, it appears the mill company promised to pay the amount, but failed to do so, for which a complaint was filed under Sections 406 and 420 I.P.C. Considering the facts and circumstances of the case, the Apex Court has ruled:

"Mere subsequent promise by petitioners 1 and 2 of the mill company to clear the outstanding by the end of September 1986 and their failure to do so cannot render them liable under Sections 406 or 420 I.P. C. In mercantile transactions consignments are delivered on credit and very often the payment cannot be made on the due date but that does not attract penal consequences."

Here also, even as per the allegations in the complaint, at the beginning, it is an ordinary simple transaction for the purchase of cloth and thereafter, as admitted by the complainant himself, prompt payments were made by the accused and for the reasons best known to the accused, thereafter he was unable to honour the bills or clear the debt and this would mean only a breach of agreement, not attracting penal consequence. The Apex Court has ruled further, failure to keep this promise cannot convert a purely business tra nsaction into one of a penal nature punishable under Sections 406 and 420 I.P.C.

27. In Hridaya Rajan Prasad Verma v. State of Bihar (2000 SCC

(Cri) 786), the Apex Court has ruled:

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed.

Judged on the touchstone of the principles noted above, the present case, in our considered view warrants interference inasmuch as the ingredients of the offence of cheating punishable under Section 420 I. P.C. and its allied offences under Sections 418 and 423 has not been made out."

The complaints do not make out a case of intentional deception on the part of the accused, right at the beginning of the negotiations for the transaction, has neither been expressly stated nor indirectly suggested in the complaints. Thus I find, the main ingredients of dishonest intention, in order to deceive the complainant is absent, even accepting all the averments in the complaint on their face value.
28. The learned counsel for the petitioner further submits, that the allegations leveled in both the complaints would reveal, that the parties were carrying on business for quite sometime, on credit basis and the payments were being made for the supplies effected, even admittedly and thereafter alone, the complainant could not realise the money, for the goods supplied. In this view, he further submits that mere failure to pay the payments along with accrued interest as per the invoice, on the stipulated date, cannot per se make the transaction a dishonest one, so as to attract the penal provisions. In aid, he relied upon a decision in S.W. PALANITKAR v. STATE OF BIHAR (2002 SCC (Crl.) 129). In the said decision, the Hon'ble Supreme Court has threadbare analysed the ingredients required under Sections 405, 406 and 420 I.P.C. and in fine concluded,
"Every breach of trust may not result in a penal offence of criminal breach of trust unless there is evidence of a mental act of fraudulent misappropriation. An act of breach of trust involves a civil wrong in respect of which the person wronged may seek his redress for damages in a civil court but a breach of trust with mens rea gives rise to a criminal prosecution as well.", thereby ruling, that if the breach of trust is coupled with mens rea alone, criminal prosecution would lie.

29. The main requirements of Section 415 I.P.C., in order to attract 420 I.P.C. are: (1) the person must dishonestly or fraudulently induced the complaint to deliver any property and (2) the person should intentionally induced the complainant to do or omit to do a thing. Here, even taking the entire averments as such, no prima facie case is made out, so as to

say that the accused petitioner would have acted dishonestly or fraudulently, thereby inducing the complainant/ respondent to deliver the property. In the above ruling affirming the decision in Hridaya Rajan Prasad Verma's, the Apex

Court has ruled that without mens rea there cannot be any breach of trust, resulting in criminal prosecution and in that view, taking cognizance of the offence against some of the accused in that case was quashed.

30. In Alpic Finance Ltd. v. P. Sadasivam (2001 SCC (Crl.) 565, the Apex Court has ruled, merely because remedy by way of civil suit is available is not an impediment in maintaining a criminal complaint, provided the complaint discloses the ingredients of the offence alleged. It is also the dictum of the Apex Court in that case, that default made by the respondent in payment of instalments by way of repayment of loan advanced by appellant under a lease agreement between the parties for purchase of some article would not disclose element of deception or fraud or dishonest inducement or willful representation in the entire transaction.

31. By going through both the complaints, I am unable to find out any materials, prima facie, even disclosing the requirements either for Section 406 or 420 I.P.C. Therefore, on the basis of the above rulings relied upon by the learned counsel for the petitioner, I am of the considered opinion, considering the facts and circumstances also, that 'civil profile' outweighs the 'criminal outfit' as held in Medchl Chemicals & Pharma (P) Ltd.'s case. Under the above said circumstances, it is to be held that the respondents/complainants had chosen the short circuited way to realise the amount, converting a civil case into a criminal one, thereby abusing the court process and therefore, invoking the inherent jurisdiction under Section 482 Cr.P.C., the proceedings in both the cases should be quashed.

32. The learned trial Judge, without considering the facts in proper perspective and not even applying the mind, to find out whether any criminal offence is made out or not, took the case as such, which appears to be, in my view, incorrect. Under the above circumstances, I am inclined to allow these two petitions, quashing the proceedings against the petitioner.

In the result, both the petitions are allowed and the proceedings against the petitioner in C.C.No.208/2003 and 209/2003 on the file of the Judicial Magistrate No.V, Salem, are quashed.

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To
1. The Judicial Magistrate No.V,
Salem.

2. The Chief Judicial Magistrate No.V,
Salem.